

SENATE BILL 558

P2

EMERGENCY BILL

11r2290

By: **Senators Pugh, Jones-Rodwell, McFadden, Peters, Ramirez, and Rosapepe**

Introduced and read first time: February 4, 2011

Assigned to: Education, Health, and Environmental Affairs

Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: March 26, 2011

CHAPTER _____

1 AN ACT concerning

2 **Minority Business Enterprise Program – Amendments to MBE Participation**
3 **Schedule ~~and Termination Extension~~**

4 FOR the purpose of requiring a certain bidder or offeror to notify a certain unit of
5 State government ~~at a certain~~ within a certain period of time if, after
6 submission of a bid or proposal and before the execution of a certain contract,
7 the bidder or offeror determines that a certain minority business enterprise
8 identified in a certain MBE participation schedule has become or will become
9 unavailable or is determined to be ineligible to perform the work required under
10 the contract; authorizing a certain bidder or offeror to submit a written request
11 to a unit to amend a certain MBE participation schedule under certain
12 circumstances; requiring a certain written request to include certain
13 information; prohibiting an MBE participation schedule from being amended
14 unless the amendment is approved by certain persons; prohibiting an MBE
15 participation schedule from being amended after the date of contract execution
16 unless approved by a certain person and by contract amendment; defining a
17 certain term; ~~continuing until a certain date certain provisions of the State~~
18 ~~Procurement Law relating to procurement from minority business enterprises;~~
19 ~~requiring a certain study and a final report on the study by a certain date;~~
20 ~~providing for the application of certain provisions of this Act; providing for the~~
21 ~~effective dates of this Act~~ making this Act an emergency measure; and generally
22 relating to minority business enterprise participation in procurement contracts.

23 BY repealing and reenacting, with amendments,

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 Article – State Finance and Procurement
 2 Section 14–302 ~~and 14–309~~
 3 Annotated Code of Maryland
 4 (2009 Replacement Volume and 2010 Supplement)

5 ~~BY repealing and reenacting, with amendments,~~
 6 ~~Chapter 116 of the Acts of the General Assembly of 1995, as amended by~~
 7 ~~Chapters 495 and 496 of the Acts of the General Assembly of 2000,~~
 8 ~~Chapter 339 of the Acts of the General Assembly of 2001, and Chapter~~
 9 ~~359 of the Acts of the General Assembly of 2006~~
 10 ~~Section 2~~

11 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
 12 MARYLAND, That the Laws of Maryland read as follows:

13 **Article – State Finance and Procurement**

14 14–302.

15 (a) (1) Except for leases of real property and except as provided in
 16 paragraphs (2) and (3) of this subsection, each unit shall structure procurement
 17 procedures, consistent with the purposes of this subtitle, to try to achieve the following
 18 results:

19 (i) a minimum of 7% of the unit's total dollar value of
 20 procurement contracts is to be made directly or indirectly from certified minority
 21 business enterprises classified by the certification agency as African American–owned
 22 businesses;

23 (ii) a minimum of 10% of the unit's total dollar value of
 24 procurement contracts is to be made directly or indirectly from certified minority
 25 business enterprises classified by the certification agency as women–owned
 26 businesses; and

27 (iii) an overall minimum of 25% of the unit's total dollar value of
 28 procurement contracts is to be made directly or indirectly from all certified minority
 29 business enterprises.

30 (2) (i) Except as provided in paragraph (3) of this subsection, in
 31 procurement for construction, each unit shall structure procurement procedures,
 32 consistent with the purposes of this subtitle, to try to achieve the following results:

33 1. a minimum of 7% of the unit's total dollar value of
 34 construction contracts is to be made directly or indirectly from certified minority
 35 business enterprises classified by the certification agency as African American–owned
 36 businesses;

1 2. a minimum of 10% of the unit's total dollar value of
2 construction contracts is to be made directly or indirectly from certified minority
3 business enterprises classified by the certification agency as women-owned
4 businesses; and

5 3. an overall minimum of 25% of the unit's total dollar
6 value of construction contracts is to be made directly or indirectly from all certified
7 minority business enterprises.

8 (ii) The unit shall:

9 1. consider the practical severability of the construction
10 projects; and

11 2. implement a program that will enable the unit to
12 evaluate each contract to determine the appropriateness of the goal.

13 (3) With respect to the Maryland Department of Transportation, the
14 provisions of paragraph (2)(i) of this subsection shall apply only to construction
15 contracts in excess of \$50,000.

16 (4) (i) A woman who is also a member of an ethnic or racial
17 minority group may be certified in that category in addition to the gender category.

18 (ii) For purposes of achieving the goals in this subsection, a
19 certified minority business enterprise may participate in a procurement contract and
20 be counted as a woman-owned business, or as a business owned by a member of an
21 ethnic or racial group, but not both, if the business has been certified in both
22 categories.

23 (5) Each unit shall meet the maximum feasible portion of the goals
24 stated in paragraphs (1), (2), and (3) of this subsection by using race-neutral measures
25 to facilitate minority business enterprise participation in the procurement process.

26 (6) To achieve the result specified in paragraph (1) or (2) of this
27 subsection, a contractor, including a contractor that is a certified minority business
28 enterprise, shall:

29 (i) identify specific work categories appropriate for
30 subcontracting;

31 (ii) at least 10 days before bid opening, solicit minority business
32 enterprises, through written notice that:

33 1. describes the categories of work under item (i) of this
34 paragraph; and

1 2. provides information regarding the type of work being
2 solicited and specific instructions on how to submit a bid;

3 (iii) attempt to make personal contact with the firms in item (ii)
4 of this paragraph;

5 (iv) assist minority business enterprises to fulfill bonding
6 requirements or to obtain a waiver of those requirements;

7 (v) in order to publicize contracting opportunities to minority
8 business enterprises, attend prebid meetings or other meetings scheduled by the unit;
9 and

10 (vi) upon acceptance of a bid, provide the unit with a list of
11 minority businesses with whom the contractor negotiated, including price quotes from
12 minority and nonminority firms.

13 (7) (i) The unit shall make a finding whether the contractor
14 complied, in good faith, with paragraph (6) of this subsection.

15 (ii) If the unit finds the contractor complied with paragraph (6)
16 of this subsection, the unit may not require the contractor to renegotiate any
17 subcontract in order to achieve a different result.

18 (8) **(I) IN THIS PARAGRAPH, “MBE PARTICIPATION**
19 **SCHEDULE” MEANS A SCHEDULE INCLUDED IN THE SUBMISSION OF A BID OR**
20 **OFFER THAT:**

21 **1. IDENTIFIES THE CERTIFIED MINORITY BUSINESS**
22 **ENTERPRISES THAT A BIDDER OR OFFEROR AGREES TO USE IN THE**
23 **PERFORMANCE OF THE CONTRACT; AND**

24 **2. THE PERCENTAGE OF CONTRACT VALUE**
25 **ATTRIBUTED TO EACH CERTIFIED MINORITY BUSINESS ENTERPRISE.**

26 **(II) ~~A BIDDER OR OFFEROR SHALL IMMEDIATELY NOTIFY~~**
27 **~~THE UNIT IF,~~ **1. THIS PARAGRAPH APPLIES TO A BIDDER OR****
28 **OFFEROR AFTER SUBMISSION OF A BID OR PROPOSAL AND BEFORE THE**
29 **EXECUTION OF A CONTRACT WITH AN EXPECTED DEGREE OF MINORITY**
30 **BUSINESS ENTERPRISE PARTICIPATION.**

31 **2. IF THE BIDDER OR OFFEROR DETERMINES THAT A**
32 **MINORITY BUSINESS ENTERPRISE IDENTIFIED IN THE MBE PARTICIPATION**
33 **SCHEDULE HAS BECOME OR WILL BECOME UNAVAILABLE OR IS INELIGIBLE TO**
34 **PERFORM THE WORK REQUIRED UNDER THE CONTRACT, THE BIDDER OR**

1 OFFEROR SHALL NOTIFY THE UNIT WITHIN 72 HOURS OF MAKING THE
2 DETERMINATION.

3 (III) 1. IF A MINORITY BUSINESS ENTERPRISE
4 IDENTIFIED IN THE MBE PARTICIPATION SCHEDULE SUBMITTED WITH A BID OR
5 OFFER HAS BECOME OR WILL BECOME UNAVAILABLE OR IS INELIGIBLE TO
6 PERFORM THE WORK REQUIRED UNDER THE CONTRACT, THE BIDDER OR
7 OFFEROR MAY SUBMIT A WRITTEN REQUEST WITH THE UNIT TO AMEND THE
8 MBE PARTICIPATION SCHEDULE.

9 2. THE REQUEST TO AMEND THE MBE
10 PARTICIPATION SCHEDULE SHALL INDICATE THE BIDDER'S OR OFFEROR'S
11 EFFORTS TO SUBSTITUTE ANOTHER CERTIFIED MINORITY BUSINESS
12 ENTERPRISE TO PERFORM THE WORK THAT THE UNAVAILABLE OR INELIGIBLE
13 MINORITY BUSINESS ENTERPRISE WOULD HAVE PERFORMED.

14 3. EXCEPT AS PROVIDED IN SUBSUBPARAGRAPH 4
15 OF THIS SUBPARAGRAPH, AN MBE PARTICIPATION SCHEDULE MAY NOT BE
16 AMENDED UNLESS THE AMENDMENT IS APPROVED BY THE UNIT'S
17 PROCUREMENT OFFICER AFTER CONSULTING WITH THE UNIT'S MBE LIAISON.

18 4. AN MBE PARTICIPATION SCHEDULE MAY NOT BE
19 AMENDED AFTER THE DATE OF CONTRACT EXECUTION UNLESS THE REQUEST IS
20 APPROVED BY THE HEAD OF THE UNIT AND THE CONTRACT IS AMENDED.

21 (9) If, during the performance of a contract, a certified minority
22 business enterprise contractor or subcontractor becomes ineligible to participate in the
23 Minority Business Enterprise Program because one or more of its owners has a
24 personal net worth that exceeds the amount specified in § 14-301(i)(3) of this subtitle:

25 (i) that ineligibility alone may not cause the termination of the
26 certified minority business enterprise's contractual relationship for the remainder of
27 the term of the contract; and

28 (ii) the certified minority business enterprise's participation
29 under the contract shall continue to be counted toward the program and contract
30 goals.

31 (b) (1) The provisions of §§ 14-301(f) and 14-303 of this subtitle and
32 subsection (a) of this section are inapplicable to the extent that any unit determines
33 the provisions to be in conflict with any applicable federal program requirement.

34 (2) The determination under this subsection shall be included with the
35 report required under § 14-305 of this subtitle.

1 ~~SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland~~
2 ~~read as follows:~~

3 ~~Article State Finance and Procurement~~

4 ~~14-309.~~

5 ~~The provisions of §§ 14-301 through 14-305 of this subtitle, and any regulations~~
6 ~~adopted under those sections, shall be of no effect and may not be enforced after July~~
7 ~~1, [2011] 2013.~~

8 ~~Chapter 116 of the Acts of 1995, as amended by Chapters 495 and 496 of the~~
9 ~~Acts of 2000, Chapter 339 of the Acts of 2001, and Chapter 359 of the Acts of~~
10 ~~2006~~

11 ~~SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency,~~
12 ~~in consultation with the General Assembly and the Office of the Attorney General,~~
13 ~~shall initiate a study of the Minority Business Enterprise Program to evaluate the~~
14 ~~Program's continued compliance with the requirements of the Croson decision and any~~
15 ~~subsequent federal or constitutional requirements. In preparation for the study, the~~
16 ~~Board of Public Works may adopt regulations authorizing a unit of State government~~
17 ~~to require bidders and offerors to submit information necessary for the conduct of the~~
18 ~~study. The Board of Public Works may designate that certain information received in~~
19 ~~accordance with regulations adopted under this section shall be confidential.~~
20 ~~Notwithstanding that certain information may be designated by the Board of Public~~
21 ~~Works as confidential, the certification agency may provide the information to any~~
22 ~~person that is under contract with the certification agency to assist in conducting the~~
23 ~~study. The study shall also evaluate race-neutral programs and other methods that~~
24 ~~can be used to address the needs of minority businesses. The final report on the study~~
25 ~~shall be submitted to the Legislative Policy Committee of the General Assembly prior~~
26 ~~to September 30, [2010] 2012, so that the General Assembly may review the report~~
27 ~~prior to the [2011] 2013 Session.~~

28 ~~SECTION 3. AND BE IT FURTHER ENACTED, That Section 1 of this Act shall~~
29 ~~take effect October 1, 2011.~~

30 ~~SECTION 4. 2. AND BE IT FURTHER ENACTED, That, except as provided in~~
31 ~~Section 3 of this Act, this Act shall take effect July 1, 2011 is an emergency measure,~~
32 ~~is necessary for the immediate preservation of the public health or safety, has been~~
33 ~~passed by a ye and nay vote supported by three-fifths of all the members elected to~~
34 ~~each of the two Houses of the General Assembly, and shall take effect from the date it~~
35 ~~is enacted.~~